

Tuesday, November 1, 2005

The Board met at its offices at 1350 Front Street, Room B109, San Diego, at 9:30 a.m., with Mr. Chiang, Chair, Mr. Parrish, Vice Chair, Ms. Yee and Mr. Leonard present, Ms. Mandel present on behalf of Mr. Westly in accordance with Government Code section 7.9.

HOMEOWNER AND RENTER PROPERTY TAX ASSISTANCE CLAIM HEARING

G. A. Ernst, 295483

2004, \$1.00 or more

For Claimant:

George A. Ernst, Taxpayer

For Franchise Tax Board:

Jane Perez, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether respondent properly denied appellant's claim for property tax assistance.

Appellant's Exhibit: Miscellaneous Documents (Exhibit 11.1)

Action: Upon motion of Mr. Parrish, seconded by Mr. Leonard and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board submitted the appeal for decision.

Exhibits to these minutes are incorporated by reference.

CORPORATE FRANCHISE AND PERSONAL INCOME TAXES HEARINGS

Noel W. Spaid, 282897

2002, \$5,820.00 Tax, \$1,455.00 Late Filing Penalty, \$1,455.00 Notice and Demand Penalty

For Appellant:

Noel W. Spaid, Taxpayer

For Franchise Tax Board:

Jane Perez, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether respondent's method of determining appellant's income for 2002 is entitled to a presumption of correctness.

If respondent's method is entitled a presumption of correctness, whether appellant has met her burden of proving that respondent's determination was erroneous.

Appellant's Exhibit: Miscellaneous Documents (Exhibit 11.2)

Action: Upon motion of Ms. Mandel, seconded by Ms. Yee and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board submitted the appeal for decision.

Mr. Leonard requested the Legal Department to investigate the limits and authorities of the Franchise Tax Board to ascertain taxpayer-specific financial information and to determine if other sources, such as credit checks, are barred by confidentiality laws.

Byron and Donnia Howell, 246320

1999, \$610.00 Assessment

For Appellant:

Byron Howell, Taxpayer

For Franchise Tax Board:

Mark McEvilly, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

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Issues: Whether respondent has jurisdiction to assess a tax liability on California-source income.

Whether respondent properly considered appellants' non-California-source income in the determination of appellants' California tax liability.

Whether constitutional arguments may be addressed in this appeal.

Whether respondent abused its discretion in refusing to abate interest.

Appellant's Exhibit: Miscellaneous Documents (Exhibit 11.3)

Action: Upon motion of Ms. Mandel, seconded by Mr. Parrish and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board submitted the appeal for decision.

Gregory J. Galaski, 282944

1999, \$5,145.00 Tax, \$1,286.25 Late Filing Penalty, \$2,164.50 Notice and Demand Penalty

2000, \$2,648.00 Tax, \$662.00 Late Filing Penalty, \$2,187.50 Notice and Demand Penalty

For Appellant: Gregory J. Galaski, Taxpayer

For Franchise Tax Board: Mark McEvilly, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether appellant has met his burden to prove error in the proposed assessment.

Whether appellant has shown reasonable cause for relief from the late filing and notice and demand penalties.

Whether respondent properly imposed the filing enforcement fee.

Whether a frivolous appeal penalty should be imposed.

Appellant's Exhibit: Brief (Exhibit 11.4)

Action: Upon motion of Ms. Mandel, seconded by Mr. Leonard and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board submitted the appeal for decision.

Albert J. Henry, 260772

1994, \$18,425.00 Assessment

1995, \$37,062.00 Assessment

For Appellant: James H. West, CPA

For Franchise Tax Board: Edward J. Kline, Tax Counsel

Jozel Brunett, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether respondent properly attributed a portion of appellant's income to California based on the number of days appellant allegedly performed business-related duties in California.

Whether appellant has demonstrated that respondent should abate interest.

Action: Upon motion of Ms. Yee, seconded by Mr. Parrish and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board submitted the appeal for decision.

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Todd William and Mari Ellen Gutschow, 270327

2000, \$9,349.25 Claim for Refund

For Appellant:

Thor J. Eakes, CPA

For Franchise Tax Board:

Jozel Brunett, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether appellants have shown that respondent abused its discretion by not abating interest.

Action: Upon motion of Ms. Yee, seconded by Ms. Mandel and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board submitted the appeal for decision.

Herman A. and Donna M. Ahlers, 257952

1994, \$170,645.00 Assessment

For Appellant:

John J. Proko, CPA

For Franchise Tax Board:

Edward Kline, Tax Counsel

Jozel Brunett, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether respondent correctly determined the amount of Terra Nova Associates' realized gain from its partially tax-deferred like-kind exchange involving its Chula Vista property, by properly including appellants' Internal Revenue Code (IRC) section 743 basis adjustments for appellants' share of TN Associates' and Terra Nova Associates' interests in Chula Vista.

Whether respondent correctly allocated Terra Nova Associates' recognized gain among its partners, including appellants, in accordance with Terra Nova Associates' partnership agreement, T.N. Associates' partnership agreement and both partnerships' partners' interests in the respective partnerships in accordance with IRC section 704 and the regulations thereunder.

Whether appellants are entitled to abatement of the accrued interest due on the unpaid tax as a result of respondent's undue delay in processing this claim.

Appellant's Exhibit: Briefs (Exhibit 11.5)

Action: Upon motion of Mr. Parrish, seconded by Mr. Leonard and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee and Mr. Leonard voting yes, Ms. Mandel absent and not participating, the Board submitted the appeal for decision at a later date.

Kyocera International, Inc., 246275

1996, \$582,802.00 Claim for Refund

1997, \$546,979.00 Claim for Refund

1998, \$944,315.00 Claim for Refund

For Claimant:

Derick Brannan, Representative

Bill Edwards, Representative

For Franchise Tax Board:

Melissa Wulff, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether appellant was engaged in a unitary business with its South Carolina affiliate, via a common Japanese parent, by virtue of the "Monsanto doctrine."

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If the first issue is resolved in respondent's favor, whether a water's edge election resulting in the exclusion of the common Japanese parent from the combined report precludes application of the "Monsanto doctrine."

If the first two issues are resolved in respondent's favor, whether the inclusion of the South Carolina affiliate in appellant's water's-edge combined report produces a distorted result that warrants adjustment of the standard apportionment formula.

Action: Upon motion of Mr. Parrish, seconded by Mr. Leonard and duly carried, Mr. Parrish, Mr. Leonard voting yes, Ms. Yee voting no, Mr. Chiang and Ms. Mandel absent and not participating, the Board granted the claim, reversing the action of the Franchise Tax Board.

The Board recessed at 12:15 p.m. and reconvened at 1:00 p.m. with Mr. Chiang, Ms. Yee, Mr. Leonard and Ms. Mandel present.

SALES AND USE TAX APPEALS HEARINGS

Shelter Island, Inc., 234226 (FH)

4-1-00 to 12-31-02, \$4,274.96 Tax

For Petitioner:

Susan Baumann, Taxpayer

For Sales and Use Tax Department:

Cary Huxsoll, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether petitioner has established that the gratuities included in the taxable measure were in fact optional, and thus not subject to sales tax.

Action: Upon motion of Mr. Chiang, seconded by Ms. Mandel and unanimously carried, Mr. Chiang, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, Mr. Parrish absent, the Board ordered that the taxable measure be reduced by 50 percent, otherwise redetermine as recommended by the Appeals Division, and referred the matter to the Business Tax Committee.

Aerowind Corporation, 139110 (FH)

4-1-98 to 12-31-00, \$2,667.55 Tax

For Petitioner:

Scott Davis, Representative

For Sales and Use Tax Department:

Cary Huxsoll, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether petitioner stored, used, or consumed in this state the FDM 1650 rapid prototype machine at issue, which it purchased ex-tax from an out-of-state vendor.

Whether the evidence is sufficient to show that petitioner resold certain reprographics prior to use.

Action: Upon motion of Ms. Yee, seconded by Mr. Leonard and unanimously carried, Mr. Chiang, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, Mr. Parrish absent, the Board ordered that the petition be submitted for decision.

F. J. and Mary Ellen Bloomingdale, 89001122550 (UT)

6-1-93 to 6-30-93, \$9,300.00 Tax, \$930.00 Failure to File Penalty

For Petitioner:

F. J. Bloomingdale, Taxpayer

For Sales and Use Tax Department:

Randy Ferris, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

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Issues: Whether petitioners purchased the vessel, Sea Flat.
Whether the measure of use tax is \$120,000.00.
Whether the purchase of the vessel was exempt because the vessel was used in charter sports fishing outside the territorial waters of California.
Action: Upon motion of Ms. Mandel, seconded by Ms. Yee and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

Alpert Auto Wholesale, Inc., 143310 (FH)

4-1-97 to 6-30-00, \$29,768.18 Tax

For Petitioner: Walter Ludlow, Representative

For Sales and Use Tax Department: Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether the Sales and Use Tax Department (Department) properly determined that petitioner had additional unreported taxable sales.

Whether petitioner has provided sufficient support for certain claimed sales for resale.

Whether the Department properly disallowed certain transactions petitioner claimed were excluded from gross receipts because the merchandise was returned by the customer.

Action: Upon motion of Mr. Parrish, seconded by Mr. Leonard and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the measure be reduced as to issues one and two as recommended by the Sales and Use Tax Department and that the remaining issue be submitted for decision.

Cortez Fuel Dock, Inc., 151068 (FH)

1-1-97 to 2-28-01, \$62,532.00 Claim for Refund

William Poole, et al., 246155 (FH)

5-15-98 to 2-28-01, \$6,249.00 Claim for Refund

For Claimant: Erik M. Poole, Taxpayer
William Poole, Taxpayer
Betty Stein, Representative

For Sales and Use Tax Department: Randy Ferris, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: A non-disqualifying contribution was disclosed to Mr. Parrish. No other contributions were disclosed.

Issue: Whether claimants may receive a refund when claimants collected tax reimbursement and reported tax allegedly because Board employees misinformed claimants regarding the applicable sales tax exemption during several telephone conversations.

Action: Upon motion of Ms. Mandel, seconded by Ms. Yee and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

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John Raymond Collins and Lisa House, 170436 (UT)

8-14-98, \$58,371.63 Tax

For Petitioner:

Cris John Wenthur, Attorney

John Raymond Collins, Taxpayer

Lisa House, Taxpayer

For Sales and Use Tax Department:

Randy Ferris, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether petitioner made a taxable use of the vessel in California.

Action: Mr. Parrish moved to redetermine the tax on the basis of \$350,000.00. The motion was seconded by Mr. Chiang but no vote taken.

Upon motion of Mr. Chiang, seconded by Mr. Parrish and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision, granting the petitioner 30 days to file supporting documents, the Department 30 days to respond, and the Appeals Division 30 days thereafter to review the petitioner's supporting documents, the Department's response and provide its recommendation to the Board.

AGS Enterprises, Inc., 215145 (FH)

7-10-98 to 9-30-01, \$88,943.09 Tax, \$9,188.85 Negligence Penalty

For Petitioner:

Mashallah Afshar, Enrolled Agent

Shawn Sagart, Taxpayer

For Sales and Use Tax Department:

Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether the measure of tax for unreported vehicle sales and unreported taxable document and smog fees should be reduced to account for vehicles that were allegedly held on consignment by petitioner and returned to the owners without being sold.

Whether the negligence penalty assessed against petitioner should be sustained.

Action: Upon motion of Mr. Leonard, seconded by Mr. Parrish and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision, granting the petitioner 30 days to file supporting documents, the Department 30 days to respond, and the Appeals Division 30 days thereafter to review the petitioner's supporting documents, the Department's response and provide its recommendation to the Board.

Cosmos Medical Technology, Inc., 198974 (FHB)

7-1-98 to 12-31-01, \$15,019.15 Tax, \$6,802.64 Negligence Penalty

For Petitioner:

Stuart Hurwitz, J.D., L.L.M.

John Clark, Taxpayer

Janet I. Bumford, Accountant

For Sales and Use Tax Department:

Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether the evidence supports additional adjustments to the audited amount of taxable sales.

Whether the negligence penalty was properly applied.

Action: The Board ordered that this hearing be continued later in the day.

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Cities of Anaheim, et al., 254561

4-1-94 to 12-31-05, \$1,029,557.00 Tax

For Petitioner:

Al Koch, Attorney

Robert Cendejas, Attorney (City of Ontario)

Janis Varney, Witness

Irina Kumits, Witness (City of San Diego)

For Sales and Use Tax Department:

Carole Ruwart, Tax Counsel

Issue: Whether local use tax collected by the retailer should have been allocated directly to the jurisdictions of first functional use or instead indirectly through countywide pools.

Action: Mr. Leonard moved to deny periods prior to July 1, 1996 and grant periods July 1, 1996 and thereafter. The motion was seconded by Mr. Parrish but failed to carry, Mr. Parrish and Mr. Leonard voting yes, Ms. Yee and Ms. Mandel voting no, Mr. Chiang absent and not participating.

Upon motion of Ms. Mandel, seconded by Ms. Yee and unanimously carried, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, Mr. Chiang absent and not participating, the Board ordered that the petition be submitted for decision.

Cosmos Medical Technology, Inc., 198974 (FHB)

7-1-98 to 12-31-01, \$15,019.15 Tax, \$6,802.64 Negligence Penalty

For Petitioner:

Stuart Hurwitz, J.D., L.L.M.

John Clark, Taxpayer

Janet I. Bumford, Accountant

For Sales and Use Tax Department:

Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether the evidence supports additional adjustments to the audited amount of taxable sales.

Whether the negligence penalty was properly applied.

Action: Upon motion of Mr. Leonard, seconded by Mr. Parrish and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision, granting the petitioner 30 days to file supporting documents, the Department 30 days to respond, and the Appeals Division 30 days thereafter to review the petitioner's supporting documents, the Department's response and provide its recommendation to the Board.

FINAL ACTION ON HOMEOWNER AND RENTER PROPERTY TAX ASSISTANCE CLAIM HEARING HELD NOVEMBER 1, 2005

G. A. Ernst, 295483

Final Action: Upon motion of Mr. Leonard, seconded by Ms. Yee and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board sustained the action of the Franchise Tax Board.

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**FINAL ACTION ON CORPORATE FRANCHISE AND PERSONAL INCOME TAXES
HEARINGS HELD NOVEMBER 1, 2005**

Noel W. Spaid, 282897

Final Action: Upon motion of Ms. Yee, seconded by Mr. Leonard and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board sustained the action of the Franchise Tax Board.

Byron and Donnia Howell, 246320

Final Action: Upon motion of Ms. Yee, seconded by Ms. Mandel and unanimously carried, Mr. Chiang, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, Mr. Parrish abstaining, the Board sustained the action of the Franchise Tax Board.

Gregory J. Galaski, 282944

Final Action: Ms. Yee moved to sustain the action of the Franchise Tax Board and impose a \$750.00 frivolous appeal penalty. Ms. Mandel seconded the motion. Ms. Yee withdrew the motion.

Upon motion of Ms. Yee, seconded by Mr. Parrish and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board sustained the action of the Franchise Tax Board.

Albert J. Henry, 260772

Final Action: Upon motion of Ms. Yee, seconded by Mr. Parrish and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board sustained the action of the Franchise Tax Board.

Todd William and Mari Ellen Gutschow, 270327

Final Action: Upon motion of Ms. Yee, seconded by Ms. Mandel and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board sustained the action of the Franchise Tax Board.

**FINAL ACTION ON SALES AND USE TAX APPEALS HEARINGS HELD
NOVEMBER 1, 2005**

F. J. and Mary Ellen Bloomingdale, 89001122550 (UT)

Final Action: Upon motion of Ms. Yee, seconded by Ms. Mandel and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the petition be redetermined as recommended by the Appeals Division.

Aerowind Corporation, 139110 (FH)

Final Action: Upon motion of Mr. Leonard, seconded by Mr. Chiang and unanimously carried, Mr. Chiang, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, Mr. Parrish not participating, the Board ordered that the amnesty interest penalty be relieved if, within 30 days of the Notice of Redetermination, petitioner either: pays the full amount of tax and interest due; or enters into an installment agreement with the Sales and Use Tax Department for full payment of the tax and interest due within 13 months, and successfully completes that installment agreement; otherwise redetermine as recommended by the Appeals Division.

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SALES AND USE TAX APPEALS HEARINGS

Ernie's Liquor, Inc., 206849 (FH)

7-1-98 to 6-30-01, \$8,468.60 Tax

For Petitioner:

Appearance Waived

For Sales and Use Tax Department:

Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether the audited overstatement of claimed exempt sales of food products should be reduced.

Action: Upon motion of Mr. Leonard, seconded by Ms. Yee and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the petition be redetermined in accordance with the revised recommendation of the Appeals Division.

FINAL ACTION ON SALES AND USE TAX APPEALS HEARINGS HELD NOVEMBER 1, 2005

Alpert Auto Wholesale, Inc., 143310 (FH)

Final Action: Upon motion of Ms. Yee, seconded by Mr. Leonard and unanimously carried, Mr. Chiang, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, the Board ordered that the remainder of the petition be redetermined as recommended by the Appeals Division.

Cortez Fuel Dock, Inc., 151068 (FH)

William Poole, et al., 246155 (FH)

Final Action: Mr. Parrish moved to grant the petition. The motion was seconded by Mr. Leonard but failed to carry, Mr. Parrish and Mr. Leonard voting yes, Mr. Chiang, Ms. Yee and Ms. Mandel voting no.

Upon motion of Ms. Yee, seconded by Ms. Mandel and duly carried, Mr. Chiang, Ms. Yee and Ms. Mandel voting yes, Mr. Parrish and Mr. Leonard voting no, the Board ordered that the petition be redetermined as recommended by the Appeals Division.

Cities of Anaheim, et al., 254561

Final Action: Upon motion of Mr. Parrish, seconded by Ms. Yee and unanimously carried, Mr. Parrish, Ms. Yee, Mr. Leonard and Ms. Mandel voting yes, Mr. Chiang not participating, the Board ordered that the petition be submitted for decision and referred the matter to the Business Taxes Committee.

The Board adjourned at 4:28 p.m. in memory of retired Congressman Edward R. Roybal, the first Latino council member for the city of Los Angeles. And Rosa Parks who refused to give up her seat on a Montgomery, Alabama bus; her actions started the modern civil rights movement.

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The foregoing minutes are adopted by the Board on February 1, 2006.

Note: The following cases were removed from the calendar prior to the meeting: *Martin and Renee Coyne, 259954; Ultraneon Sign Corporation, 187084; and, Brenton Motor Works, Inc., 252420.*